

Title	<b>Delaying Finality of Decision and Extending Time for Rehearing When Court of Appeal Belatedly Orders Opinion Published (amend Cal. Rules of Court, rules 24 and 27)</b>
Summary	The proposed amendments to rules 24 and 27 would provide that an order of the Court of Appeal to publish a previously unpublished opinion of that court will delay finality of the decision and extend the time to file a petition for rehearing.
Source	Appellate Advisory Committee
Staff	Suzanne Murphy, 415-865-7583
Discussion	<p>A decision of a Court of Appeal normally becomes final 30 days after its opinion is filed, unless the court grants rehearing or modifies its opinion in a way that changes the judgment. (Cal. Rules of Court, rule 24(a).) Any petition for rehearing must be filed within 15 days after the filing of the Court of Appeal decision (rule 27(b)), and any petition for review in the Supreme Court must be filed within 10 days after the decision becomes final in the Court of Appeal (rule 28(b)). These time limits are currently unaffected if the Court of Appeal exercises its discretion under rule 976(c)—usually in response to a request made under rule 978(a)—to certify its opinion for publication after the opinion has been filed. In contrast, the rules of the United States Court of Appeals for the Ninth Circuit provide that an order to publish as an opinion a previously unpublished memorandum disposition extends the time to file a petition for rehearing. (See Ninth Circuit rule 40-2.)</p> <p>Whether or not an opinion is published will often determine whether a party wishes to file a petition for rehearing in the Court of Appeal or a petition for review in the Supreme Court. But a belated publication order can compromise a party’s ability to file those petitions. Such orders are sometimes made after the time for filing a rehearing petition has expired, or when the time for preparing a petition for review has passed. There are also circumstances when a petition for rehearing is a prerequisite to a petition for review. (Rule 29(b)(2) [“on petition for review the Supreme Court normally will not consider . . . any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing”].) Finally, a belated publication order makes it less likely that the Court of Appeal and the Supreme Court will have the benefit of receiving the views of amici curiae about the opinion because potential amici will</p>

have less notice of the opinion before the expiration of deadlines for making their views known.

The proposed amendments to rules 24 and 27 of the California Rules of Court would ameliorate some of the problems of belated publication orders by establishing a mechanism—similar to the one found in federal rule for this circuit—to extend the time for rehearing when the Court of Appeal orders publication of a previously unpublished opinion during the period provided by rule 24 for filing a petition for rehearing. The committee has been informed by the court executive for the Ninth Circuit that Circuit rule 40-2 has not created any new administrative burdens. In fact, according to the circuit executive, the experience of the Ninth Circuit has been quite positive because its rule sets clear deadlines for action by the parties and has, thus, reduced the number of phone calls and written motions to the clerk’s office.

It should be noted that the proposed amendments do not apply to the small number of cases in which the California Supreme Court grants a request for publication that is submitted after the Court of Appeal decision has become final and the latter court has lost jurisdiction to act on the request. (See Cal. Rules of Court, rule 978(a).) Applying the principles underlying the proposal in such cases would be problematic because the Supreme Court’s authority to order publication of a Court of Appeal opinion continues indefinitely under existing rules and, thus, there would be no clear limit on delayed finality in those cases. This problem could be remedied by setting a specific limit on the period in which publication of a Court of Appeal opinion may be requested (see Ninth Circuit Rule 36-4 [request for publication will not be entertained unless received within 60 days of issuance of disposition]; cf. rule 978(a) [request must be submitted “promptly”]), but that is a matter within the constitutional authority of the Supreme Court (Cal. Const., art. VI, § 14) and beyond the purview of the committee acting alone. For those reasons, the committee has decided to pursue only the more limited amendments reflected in the attached proposal at this time. Should the instant proposal be approved and successfully implemented, the committee will consider whether to work with the Supreme Court to extend the principles of delayed finality and additional time for rehearing to all belated orders to publish previously unpublished opinions of the Courts of Appeal.

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Attachment

## PROPOSAL

Rules 24 and 27 of the California Rules of Court would be amended effective January 1, 2002, to read:

### 1   **Rule 24. Decision of reviewing court**

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3       **(a) [When decisions become final]** All decisions of the reviewing courts  
4       ~~shall~~ must be filed with the clerk, who ~~shall~~ must forthwith transmit a  
5       copy of the opinion to the lower court or tribunal and to the parties.

6  
7       A decision of the Supreme Court becomes final 30 days after filing  
8       unless the court orders a shorter time or, prior to the expiration of the  
9       30-day period or any extension, orders one or more additional periods  
10      not to exceed a total of 60 additional days. An order of the Supreme  
11      Court denying a petition for review of a decision of a Court of Appeal  
12      becomes final when it is filed.

13  
14      A decision of a Court of Appeal becomes final as to that court 30 days  
15      after filing. An order dismissing an appeal involuntarily is a decision  
16      for purposes of the preceding sentence. The decision becomes final as  
17      to that court immediately after filing upon the denial of a petition for a  
18      writ within its original jurisdiction or a writ of supersedeas, without  
19      issuance of an alternative writ or order to show cause, or the denial of an  
20      application for bail or to reduce bail pending appeal, or the denial of a  
21      transfer to a Court of Appeal in a case within the original jurisdiction of  
22      a municipal or justice court, or an order of dismissal of an appeal  
23      pursuant to a written request of the appellant or a stipulation of the  
24      parties. The denial of a petition for a writ of habeas corpus that is filed  
25      on the same day as the decision in a related appeal becomes final as to  
26      the Court of Appeal at the same time as the related appeal.

27  
28      When a decision of a reviewing court is final as to that court, it is not  
29      thereafter subject to modification or rehearing by that court, except that  
30      when the date of finality falls on a holiday or other day the clerk's office  
31      is closed, the decision may be modified or rehearing granted or denied  
32      until the close of business on the next day the clerk's office is open. If  
33      an opinion is modified without change in the judgment, during the time  
34      allowed for rehearing, the modification ~~shall~~ does not postpone the time  
35      that the decision becomes final as provided above; but if during that  
36      time the court changes the judgment ~~is modified during that time or~~  
37      orders its opinion published under rule 976(c)(1), the period specified

herein begins to run anew, ~~as of~~ from the date of the modification that has changed the judgment or from the date of the publication order.

- (b) **[Whether judgment is modified]** An order modifying an opinion ~~shall~~ must specify whether it effects a change in the judgment.
- (c) **[Filing consent to modification]** If the reviewing court orders that a judgment be reversed and a new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remission of a portion thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial ~~shall~~ becomes final unless within 30 days after the filing of the decision two copies of a written consent by such party to the remission or addition ~~shall be~~ is filed in the reviewing court. One of the copies ~~shall~~ must be transmitted with the remittitur to the superior court.
- (d) **[Discretionary early finality]** Notwithstanding subdivision (a), a Court of Appeal may order that a decision granting a writ—or denying a writ after issuance of an alternative writ or an order to show cause—within its original jurisdiction ~~shall~~ becomes final as to that court
- (1) Within a stated period less than 30 days or
- (2) Immediately, if early finality is necessary to prevent mootness or frustration of the relief granted or is otherwise necessary in the interest of justice.

## **Rule 27. Rehearing in court rendering decision**

- (a) **[Power to grant rehearing]** The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b), or on the court's own motion, before the decision becomes final.
- (b) **[Time for filing petition]** A party seeking a rehearing either in the Court of Appeal or in the Supreme Court must serve and file a petition therefor within 15 days after the filing of the decision or of a

1 modification or publication order that causes the time for rehearing to  
2 begin running anew under rule 24(a).  
3

4 (c) **[Time for filing answer]** An answer may be served and filed within 23  
5 days after the filing of the decision or of a modification or publication  
6 order that causes the time for rehearing to begin running anew under  
7 rule 24(a).  
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9 (d) **[Form of petition and answer]** Insofar as practicable, the petition and  
10 answer ~~shall~~ must conform to the provisions of rule 15.  
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12 (e) **[Determination of petition]** An order of the Supreme Court granting a  
13 rehearing ~~shall~~ must be signed by at least four judges assenting thereto,  
14 and filed with the clerk. If no order is made before the decision  
15 becomes final as provided in subdivision (a) of rule 24, the petition ~~shall~~  
16 ~~be~~ is deemed denied, and the clerk ~~shall~~ must enter a notation in the  
17 register to that effect.